Supreme Court, U.S.
FILED

No. 10-504

OCT 08 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOGINDER SINGH,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

KHAGENDRA GHARTI-CHHETRY, ESQ.
CHHETRY & ASSOCIATES, P.C.
363 7th Avenue, Suite 1500
New York, New York 10001
(212) 947-1079

Attorney for Petitioner Joginder Singh

October 8, 2010

QUESTION PRESENTED FOR REVIEW

Where, as here, an asylum applicant shows that through the lack of diligence of non-attorneys who purported to represent him and misled him into concluding that they were attorneys, and through the lack of diligence of counsel who assisted him in preparing his case, a mistake of fact occurred on the record upon which the IJ relied as crucial in reaching an adverse credibility determination, did the Petitioner make a showing of ineffective assistance of counsel?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties here and in the Ninth Circuit Court of Appeals are listed.

Petitioner here and appellant below is Joginder Singh, and respondent here and below is Eric H. Holder, Jr., Attorney General of the United States.

RULE 29.6 DISCLOSURE STATEMENT

Both Petitioner and Respondent are natural persons. There are no parent corporations or corporations that hold 10% or more of the stock of any entity in this case.

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IN THE

Supreme Court of the United States

JOGINDER SINGH,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. The opinion and order of the Board of Immigration Appeals was not reported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered the judgment sought to be reviewed on March 31, 2010. The denial of the Petitioner's timely Motion for Panel Rehearing was entered on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by Rule 29.4(b) and (c) are not required.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

5th Amendment, United States Constitution

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Joginder Singh ("Petitioner") was put into proceedings by a March 22, 2005 Notice to Appear. He requested asylum, withholding of removal under the Immigration and Nationality

Act (the "Act"), and under Article 3 of the Convention against Torture ("CAT"). This relief was denied by U.S. Immigration Judge Lawrence N. DiCostanzo ("IJ"), who after a March 15, 2006 merits hearing ordered the Petitioner removed. An appeal to the Board of Immigration Appeals ("BIA," the "Board") ensued, and by decision dated March 28, 2007 the BIA adopted and affirmed the determination of the IJ.

The Petitioner filed a Motion to Reopen dated June 26, 2007. The Board denied the Motion in an August 21, 2007 opinion. The Petitioner then filed another Motion to Reopen (the "Motion") in a filing dated September 27, 2007. Deeming this Motion a "Motion to Reconsider," the Board denied this Motion in an April 15, 2008 decision. The gravamen of the Motion was that the Petitioner was denied effective assistance of counsel because of mistakes made by his attorney that were prejudicial to him. The mistakes were manifest in the record and resulted in improper findings of fact by the IJ. Nonetheless, the Board denied all relief and affirmed the findings of the IJ. On petition for review, the United States Court of Appeals for the Ninth Circuit denied the Petitioner's petition on the grounds in a March 31, 2010 order. On a petition for rehearing, the United States Court of Appeals for the Ninth Circuit denied the motion in an order entered on July 19, 2010. This Petition followed.

B. Raising Of Federal Question

The question of the merits of the Petitioner's ineffective assistance of counsel argument was raised before the Ninth Circuit below, and was in fact extensively discussed in the Ninth Circuit's opinion.

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully requests that, because the Petitioner was not afforded the ingredients of due process of law arising from his ineffective assistance of counsel claim, he has stated a meritorious federal claim, and that his Petition for Certiorari should be granted.

The Board's views on due process in ineffective assistance of counsel claims were set forth in *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988), *aff'd sub nom. Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988). There, the Board held that a petition seeking relief on the basis of ineffective assistance of counsel must be supported by an affidavit of the aggrieved party attesting to the relevant facts, and the former counsel must be informed of the allegations and given an opportunity to respond, and any response from former counsel must be included with the motion for ineffective assistance of counsel. The motion should reflect if a disciplinary complaint was filed against the former counsel and if not, why not. Finally, the asylum applicant must be prejudiced by the former counsel's performance. *Lozada*, 19 I.&N. Dec. at 639; *Ray v. Gonzales*, 439

F.3d 582, 590 (9th Cir. 2006); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000).

The record below reflects that the Petitioner was deceived by a Mr. Heera who represented himself to be an attorney, and was not. In addition, in meetings occurring in 2003 between the Petitoner and Mr. Heera, Heera, recorded the incorrect date–August 1997—for the death of Lakhbit Singh alias Lakha, who was allegedly killed by the Punjabi police. In fact, the killing occurred in August 1999.

Thereafter, the Petitioner retained another trial attorney, Judith Lott, who failed to catch the crucial mistake of Mr. Heera. At trial, counsel for the government confronted the Petitioner with a discrepancy between that date and the date given in the Petitioner's asylum application for that event, which was August 1999. This discrepancy then became a critical factor in the adverse credibility finding by the IJ, who concluded that this discrepancy was 'fatal' to the asylum application. Finding that the Petitioner was therefore not credible, the IJ denied all relief. The Petitioner's attorney then compounded this problem by failing to provide the Petitioner with a copy of the decision of the BIA denying all relief. Thus, the Petitioner was prevented from appealing the determination of the Board directly.

The Petitioner here satisfied the elements of *Lozada*, and was denied his Fifth Amendment due process rights. The Ninth Circuit, the court

appealed from below, has held that "[i]neffective assistance of counsel amounts to a violation of due process if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005), citing *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004), and *Lopez v. I.N.S.*, 775 F.2d 1015, 1017 (9th Cir. 1985). The elements of *Lozada* are satisfied here, contrary to the findings of the Ninth Circuit below.

Ineffective assistance of counsel claims are recognized where, as here, an alien relied on non-attorneys to who have fraudulently led an alien to believe that the person relied on was an attorney. *See, e.g., Varela v. I.N.S.*, 204 F.3d 1237, 1240 (9th Cir. 2000). Such is the case here. Indeed, the Petitioner received ineffective assistance of counsel at several points in the process of attempting to retain counsel here: he was led to believe that Mr. Heera was an attorney when he was not; his trial counsel failed to catch a critical discrepancy in the papers that led directly to an adverse credibility finding; and his attorney failed to timely provide him with a copy of the Board of Immigration Appeals' determination, thereby preventing him from appealing his case.

The Ninth Circuit's holding that the Petitioner did not suffer prejudice was incorrect. The mistake by the trial counsel led directly to the adverse credibility finding of the IJ, which resulted in the loss of his case at trial. The failure of his trial attorney to provide him with a copy of the BIA's decision

prevented him from filing and perfecting a timely appeal from the determination of the Board. These acts of ineffective assistance of counsel were crucial and prejudiced the Petitioner. They are sufficient for this Court to find an infringement of the Petitioner's due process rights. For the above arguments and reasons, the Petitioner submits that this Court should grant this Petition.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Khagendra Gharti-Chhetry
363 Seventh Avenue, Suite 1500
New York, New York 10001
(212) 947-1079

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 19 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Nos. 07-73865
08-71951

Agency No. A095-584-627

JOGINDER SINGH,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

Before: PREGERSON, LEAVY, and RAWLINSON,
Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a

vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Singh's petition for panel rehearing and petition for rehearing en banc are denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 31 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Nos. 07-73865
08-71951

Agency No. A095-584-627

MEMORANDUM*

JOGINDER SINGH,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General,

Respondent.

On Petitions for Review of Orders of the
Board of Immigration Appeals

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted March 16, 2010**

Before: SCHROEDER, PREGERSON, and RAWLINSON, Circuit Judges.

In these consolidated petitions for review, Joginder Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals' ("BIA") orders denying his motion to reopen and his motion to reconsider. We have jurisdiction under 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen or reconsider and review de novo due process claims based on ineffective assistance of counsel. *Mohammed v. Gonzales*, 400 F.3d 785, 791-92 (9th Cir. 2005). We deny the petitions for review.

The BIA did not abuse its discretion in denying Singh's motion to reopen because he failed to establish prejudice. *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003) (to prevail on an ineffective assistance of counsel claim, petitioner must demonstrate prejudice).

The BIA acted within its discretion when it denied Singh's motion to reconsider because the motion failed to identify any error of fact or law in the BIA's August 21, 2007, decision denying reopening. *See* 8 C.F.R. § 1003.2(b)(1).

PETITIONS FOR REVIEW DENIED.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

United States Court of Appeals
for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment
and Post-Judgment Proceedings
(December 2009)

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41;
9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing
(Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc
(Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.

  Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en bane rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders other-

wise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.

Post Judgment Form - Rev. 12/2009

- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

[ROUND STAMP]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Chhetry, Khagendra Gharti, Esq.
363 - 7th Avenue, Suite 1500
New York, NY 10001

Office of the District Counsel/SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: SINGH, JOGINDER

A95-584-627

Date of this notice: 4/15/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
Donna Carr
Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A95 584 627 - San Francisco, CA

Date: [STAMP]
APR 15 2008

In re: JOGINDERS SINGH

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Khagendra Gharti-Chhetry, Esquire

ON BEHALF OF DHS:
Connie M. Cheung
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent, who is from India, has filed a motion to reconsider, which takes issue with the Board's August 31, 2007, decision. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (a motion to reconsider must allege a material factual or legal error, assert that the Board erred in affirming the Immigration Judge's decision without opinion, or argue a change in law). In the August 31, 2007, decision, the Board denied a motion to reopen claiming that the respondent received ineffective assistance of counsel. The pending motion to reconsider, which is opposed by the Department of Homeland Security (the "DHS"), will be denied.

First, in the Board's August 31, 2007, decision denying reopening, the Board found that the respondent's motion did not comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) for making a claim of ineffective assistance of counsel. Specifically, the respondent had not filed a complaint against his previous attorney with the appropriate disciplinary authority. The respondent argued in the motion to reopen that he had not filed the complaint because the Board was the appropriate body to resolve it. Citing law from the Ninth Circuit Court of Appeals, the Board found that the respondent had not shown that this was a sufficient reason to excuse the failure to comply with *Matter of Lozada*. The Board properly found, in denying reopening, that the respondent did not adequately explain why no complaint was filed. *See Matter of Rivera-Claros*, 21 I&N Dec. 599, 603-605 (BIA 1996); *Ray v. Gonzales*, 439 F.3d 582, (9th Cir. 2006) (*Lozada* requirements generally reasonable, but full compliance is not required if the record independently shows that claims are clear and obvious). That the respondent belatedly filed a complaint against former counsel on September 10, 2007, does not evidence error in the Board's decision denying reopening on August 31, 2007.

Next, in the August 31, 2007, decision denying reopening, the Board was correctly unpersuaded that if the respondent failed to receive its March 28, 2007, decision, it was because his previous counsel neglected to use the address he had previously given to her.

Finally, the Board's decision denying the reopening found that, aside from failing to comply with the *Matter of Lozada* procedural requirements, the respondent failed to articulate clearly how the actions of his former representative prejudiced his case or put his interests in jeopardy. The Board noted that the respondent's appeal from the Immigration Judge's decision, as well as the motion to reopen, were timely filed with this Board. Additionally, the respondent did not assert that he paid his representatives for any services that were not delivered. Respecting a claimed error in the statement included with his asylum application, the Board appropriately found that when the inconsistency between the respondent's testimony, his prior written statement and an internet article was revealed daring cross examination, the respondent was given the opportunity to resolve or otherwise explain the inconsistency. Instead, the Board properly found in denying reopening, the respondent simply failed to provide a coherent and convincing explanation for the inconsistency, and the respondent did not provide any persuasive argument that his inability to explain the inconsistency should be attributed to the services of his former representatives.

The respondent's submissions in the pending motion to reconsider do not cause the Board to reconsider its August 31, 2007, decision denying reopening. The pending motion is, therefore, denied.

[s] [ILLEGIBLE SIGNATURE]
FOR THE BOARD

[ROUND STAMP]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Gharti-Chhetry, Khagendra, Esq.
363 - 7th Avenue, Suite 1500
New York, NY 10001-0000

Office of the District Counsel/SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: SINGH, JOGINDER

A95-584-627

Date of this notice: 8/31/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
Donna Carr
Chief Clerk

Enclosure

Panel Members:
HURWITZ, GERALD S.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A95 584 627 - San Francisco, CA

Date: [STAMP]
AUG 31 2007

In re: SINGH, JOGINDER

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Khagendra Gharti-Chhetry, Esquire

ON BEHALF OF DHS:
Connie M. Cheung
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our previous decision dated March 28, 2007, in which we affirmed the Immigration Judge's finding that the respondent's incredible testimony was insufficient to carry his burden of proof to establish his eligibility for relief under the Immigration and Nationality Act. The respondent seeks reopening based on the ineffective assistance of his previous counsel. He claims that his previous counsel was hired by and received payments from a business that was engaged in the unauthorized practice of law; that

as a result of his previous counsel's lack of preparation, the Immigration Judge rendered an adverse credibility finding and he was denied relief; and that his former counsel failed to notify him of our March 28, 2007, decision. The Department of Homeland Security (DHS) has opposed the respondent's motion. The motion will be denied.

The respondent's motion does not comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). *See Lata v. INS*, 204 F.3d 1241, 1245 (9th Cir. 2000) (citing *Matter of Lozada* requirements with approval). Specifically, the respondent has not filed a complaint against his previous attorney with the appropriate disciplinary authority, a *Matter of Lozada* procedural requirement He argues in his motion that he has not filed the complaint because the Board is the appropriate body to resolve it (Respondent's Br. at 6). The Ninth Circuit has found that in certain circumstances, an alien's failure to comply with the procedural requirements of *Matter of Lozada* may be excused. *See, e.g., Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (alien's counsel failed to file timely application for relief and misled the alien); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (record showed that the alien's counsel was completely unfamiliar with the case and unsure of whether the alien had retained him as counsel). The respondent has not shown that the circumstances described in the instant motion falls in either of the foregoing reasons for excusing his failing to comply with *Matter of Lozada*. Consequently, the respondent's inef-

fective assistance of counsel claim against his previous counsel fails.

We note that the respondent claims that his previous attorney failed to notify him of the Board's March 28, 2007, decision even though he notified her of his address change on March 15, 2006, the date the Immigration Judge rendered his decision. In support of his claim, the respondent provided a copy of a notice from the DHS California Service Center (DHS notice), dated April 18, 2006, informing the respondent that it had received his address change. The DHS notice also states that approval of his application for employment authorization (Form I-765) and card were mailed to him on February 25, 2006, but were "returned as undeliverable." Thus, the record establishes that as of February 25, 2006, the respondent had changed his mailing address. The respondent is silent in his motion to reopen on his failing to provide the Immigration Judge with his New York address when the Immigration Judge asked for confirmation of his address in Santa Clara, California during the hearings on March 6, 2006 (Tr. at 58), or on March 15, 2006 (Tr. at 91). We are therefore unpersuaded that if the respondent failed to receive our March 28, 2007, decision, it was because his previous counsel neglected to use the address he had previously given to her.

The United States Court of Appeals for the Ninth Circuit, the circuit in which this matter arises, recognizes ineffective assistance claims where an alien has relied on non-attorneys who have fraudulently led the alien to believe that the person(s)

relied upon was an attorney. *See Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999). In the instant matter, the respondent charges an associate of Heera & Associates, an "Immigration Consulting Service" according to the copy of the business card the respondent provided in support of his motion, with stating incorrectly the date of the death of Lakbvir Singh, a Sikh activists, on the respondent's asylum application; falsely claiming to be an attorney; and accepting payment for legal services rendered by the respondent's previous attorney.

Aside from his failing either to comply with the *Matter of Lozada* procedural requirements or to discuss the applicability of any of those procedural requirements to this matter, the respondent has failed to articulate clearly how the actions of Heera & Associates prejudiced his case or put his interests in jeopardy. In that regard, the respondent's appeal from the Immigration Judge's decision and the instant motion to reopen were timely filed with this Board. Further, he has not asserted that he paid Heera & Associates for any services that were not delivered. Respecting the error in the statement included with his asylum application, the record reflects that when the inconsistency between the respondent's testimony, his prior written statement and an internet article was revealed during cross examination, the respondent was given the opportunity to resolve or otherwise explain the inconsistency. He simply failed to provide a coherent and convincing explanation for the inconsistency. *See* Tr. at 19-20, 51-52, 34-38, 61-63;

Exh. 4. The respondent has not provided any argument to persuade us that his inability to explain the inconsistency should be attributed to the services of Heera & Associates. He has, therefore, failed to demonstrate any prejudice resulting from the conduct of anyone employed by Heera & Associates.

Accordingly, the motion is denied.

[s] [ILLEGIBLE SIGNATURE]
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
550 KEARNY STREET, SUITE 800
SAN FRANCISCO, CA 94108

Case No.: A95 584 627

In the Matter of:

Joginder SINGH
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on March 15, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[√] The respondent was ordered removed from the United States to India .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of

$_____ with an alternative order of removal to _____.

[√] Respondent's application for asylum was ( ) granted (√) denied ( ) withdrawn ( ) other.

[√] Respondent's application for withholding of removal was ( ) granted (√) denied ( ) withdrawn ( ) other.

[√] Respondent's application for protection under Article III of the U.N. Convention Against Torture was ( ) granted (√) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for adjustment of status under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Proceedings were terminated.

[ ] Other: [ILLEGIBLE DETTO SIGNATURE]

Appeal: (A)/ I / B

Appeal due by: April 14, 2006

Date: March 15, 2006

/s/ LAWRENCE N. DI COSTANZO
Lawrence N. Di Costanzo
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL [ ]
PERSONAL SERVICE [√]

TO: [√] ALIEN [ ] ALIEN c/o Custodial Officer
[√] ALIEN'S ATTY/REP [√] DRS

DATE: 3-15-06 BY: (J)/ COURT STAFF

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ]
Legal Services List [ ]

/s/ [ILLEGIBLE SIGNATURE]

Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, VA 22041

In the matter of

JOGINDER SINGH
A095-584-627

MOTION TO REOPEN AND RECONSIDER

JOGINDER SINGH, through his attorney, Khagendra Gharti Chhetry of Chhetry & Associates, P.C., respectfully requests the BIA to reopen this case, based on the reasons as set forth below:

FACTS

The Respondent is a native and citizen of India and Sikh by religion. The Respondent states that he is an asylum applicant because he was persecuted in India due to religious and political persecution and persecution based on social group.

A feilow country man who resided nearby where the Respondent was living referred him to Heera & Associates, who the Respondent assumed as an attorney. On June 15, 2002, the Respondent went to Heera & Associates, located at 90 E. Gish Road, Suite A, San Jose, CA 95112, with Tel: 408-573-8489 and 408-422-8841. First he met with Sarjit S. Heera (Steve) (please see his visiting card as "A"),

who told to the Respondent that he will handle his immigration case. Mr. Heera told him that he was an attorney. The Respondent paid to Mr. Heera a cash of $1,000. He did not give any receipt to the Respondent. He arranged Bajjit Singh to type his application for asylum (see Exhibit "B") and Mr. Heera who asked to sign to the Respondent the application, mailed it.

Accordingly the Respondent on May 15, 2003, the Respondent had visited to Mr. Heera, who asked him to pay another $800 to represent me for interview of May 21, 2003. At this time also Mr. Heera did not give to him any receipt for this payment. After interview March 31, 2005, the Respondent case as denied and referred to the Immigration Court in San Francisco, California.

The Respondent states that on April 1, 2005, he met with Mr. Heera to discuss about the upcoming hearing of April 22, 2005 before the Immigration Court. Mr. Heera told him that his case is denied and he had to hire another attorney for this case because he does not handle the cases in the court. Mr. Heera asked him to pay and the Respondent paid him again $1,000 for the court case, the Respondent did not get any receipt of the payment. On same day on April 1, 2005, Mr. Heera took the Respondent to the office of Judith Lott, who without preparing his case told to Respondent to meet her in the immigration court on April 22, 2005. The Respondent did not pay any money to Ms. Lott. Ms. Judith Lott never told to Respondent what her legal fee was and never gave a retainer agreement to the Respondent. The Respondent believed that

Ms. Lott was attorney working together with Mr. Heera.

On April 22, 2005, Judith Lott represented to the Respondent in the Immigration Court and got a new date for January 9, 2006. On January 8, 2006, the Respondent went to see Mr. Heera and Mr. Heera's wife Jeet Kaur (Ms. Kaur) asked to the Respondent to pay and he paid $1,400 in cash for the court case, but she did not give any receipt. Ms. Kaur took him to office of Ms. Lott, who spent approximately 20 minutes discussing about his case and told to Respondent to see her at the court on next date on January 9, 2006. His case was rescheduled for March 6, 2006, and again rescheduled for March 15, 2006.

The Respondent states that on March 15, 2006, his case was denied by the judge and Ms. Lott asked him to file an appeal. The Respondent paid appeal fee of $310 to Judith Lott, who gave a receipt for the first time. See Exhibit 'C".

The Respondent states that on the same date he was told Judith Lott that he was moving to New York and gave her his new address of 42-52 Union Street, Apt #404 Flushing, NY 11355, where the Respondent still resides. Later on, the same day on March 15, 2006, the Respondent met with Mr. Heera and gave his new address of New York, who filled out a change of address form and mailed, which was received by the USCIS on March 28, 2006. See Exhibit "D".

The Respondent states that on October 11, 2006, Mr. Heera asked him to pay another $1,250 for the appeal fee preparation fee and the Respondent paid

it by a check payable to Surjit Heera. See Exhibit 'E".

The Respondent states that he was on regular contact with Mr. Heera and his wife Ms. Kaur, who told him there is no decision on his case. I also never heard from Ms. Judith Lott about the status of my case.

About five days ago when the Respondent's friend called 1-800-898-7180 and checked the status, then the Respondent found that his case was denied by the Board of Immigration Appeal (BIA) on March 28, 2007. The Respondent did not get any notice from the BIA decision from his attorney Judith Lott. Then, he called Ms. Herra's wife Ms. Kaur who told him that she will call him after checking with Ms. Lott. But Ms. Kaur did not call him back. Later Ms. Kaur suggested him to go to California to see Ms. Kaur to file a motion to reopen his case. The Respondent called and left message to Ms. Judith Lott, but she never returned his call back.

The Respondent states that his case was first denied by the immigration judge because Mr. Heera had written wrong date August 1997 as the death of Lakhbit Singh alias Lakha. If Ms. Judith Lott had prepared his case properly and corrected the mistake of his case would not have denied because there were mistakes made by non lawyer and they would have been corrected.

The Respondent states that as advice of his new attorney the Respondent notified to his previous attorney Judith Lott that he had received ineffective assistance of counsel. See attached as "F".

The Respondent states that on June 18, 2007, Judith Has sent a response to the Respondent's new attorney as Exhibit "G". In reply Ms. Lott claims to have sent a notice to his old address even if the Respondent had given her his new address of New York. She fails to state her correct relation with Mr. and Mrs. Heera. Ms. Lott never gave him time to prepare his case which is reason that she admits in her letter that the Respondent did not disclose information about Mr. Singh.

The Respondent received ineffective assistance of counsel because he was a victim of unauthorized practice of law by Mr. Heera and Ms. Kaur who hired attorney Judith Lott. Ms. Lott also did not protect his interest but worked with these persons to his detriment. Ms. Lott never prepared his case and as a result Judge found that adverse credibility. As a result, the Respondent lost his case. The Respondent was not notified by Ms. Lott and never got any notice of denial from the BIA. The Respondent received ineffective assistance of counsel.

GROUNDS FOR MOTION TO REOPEN:

Ineffective Assistance of Counsel

Respondent respectfully requests that, on the basis of the attached affidavit of the Respondent and the exhibits attached hereto and the facts as outlined below, the BIA reopen this case based on ineffective assistance of counsel under this Board's decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988):

1. In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), *aff'd sub nom. Lozada vs INS*, 857 F. 2d 10 (1st Cir 1988), a petition seeking relief on the basis of ineffective assistance of counsel must be supported by an affidavit of the allegedly aggrieved Respondent attesting to the relevant facts. Furthermore, before allegations of ineffective assistance of former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation and if not, why not. 19 I &N. at 639. "Also required in an ineffective assistance claim is the additional requirement that the petitioner be prejudiced by the performance of counsel" *Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007); see also, *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993). These requirements are satisfied in this case.

2. The Respondent states that Mr. Heera who was an unauthorized person to practice law had written wrong date August 1997 as the death of Lakhbit Singh alias Lakha. If Ms. Judith Lott, the Respondent's previous attorney had prepared his case properly and corrected the mistake of his case, his case would not have denied because there were mistakes made by non lawyer and they would have

been corrected. Moreover, the Respondent's prior attorney did not provide the Respondent with a copy of the decision of the Board in a timely manner, as it was professional ethics of an attorney. As a result, the Respondent was barred to appeal this case before the Board of Immigration Appeals.

3. The Respondent satisfies the elements of *Lozada*. He has submitted his affidavit, attached hereto, and detailing his conversation and understandings with his prior attorney with which his prior attorney did not comply. The Respondent reasonably understood that the situation would not quit deferent if he would be represented properly and handled professionally by his prior attorney by correcting the mistakes which were made by non-attorney individuals.

4. Respondent also has informed his prior counsel of the allegations against such attorney. The prior counsel has responded with a letter, which is attached hereto as Exhibit "G". After reviewing the reply of Ms. Lott, the Respondent asserts that he received bad legal advice by a non-lawyer posing as an attorney. Ms. Lott should have investigated those facts and should have known about the mistakes in his case that is prepared by non-attorney. Thus, it affected his case and it could not have been denied if it had been prepared properly.

5. *Lozada* also requires that a motion for ineffective assistance of counsel reflect whether or not a disciplinary complaint has been filed, and if not, an explanation for this should be provided. In this case, the Respondent has decided not to file a dis-

ciplinary complaint, because the attorney provided a prompt reply to his complaint, and because in Respondent's view the issues involved here are within the competence of the BIA and not that of the disciplinary committee.

6. The above facts clearly show that Respondent has complied with the requirements as set forth in *Matter of Lozada*, 191 I&N Dec. 637 (BIA 1988) and was prejudiced by prior counsel's actions because the attorney did not follow instructions and did not provide notice of the BIA's denial of her appeal. Please also note that this motion is filed within 90 days.

WHEREFORE, for the forgoing reasons, it is requested that the BIA grant a request for motion to reopen and provide an opportunity to seek asylum and remanded for further proceeding to allow the Respondent to litigate this case or the BIA enter an order or orders as may be deemed just and proper.

Respectfully submitted

Dated: June 25, 2007

/s/ Khagendra Gharti-Chhetry
Khagendra Gharti-Chhetry
Attorney for the Respondent
Chhetry & Associates, P.C.
363 7th Avenue #1500
New York, New York 10001
(212) 947-1079

Affidavit of of Joginder Singh
in Support of Motion to Reopen and Reconsider
A95-584-627

Joginder Singh under penalty of perjury duly affirms:

I am making this affidavit to reopen my case because of the following reasons:

I am a Sikh from India. I am an asylum applicant because I left India in February 10, 2002 as I was persecuted in India due to religious and political persecution and persecution based on social group.

I was seeking a help to file asylum application. A follow country men residing nearby where I was living referred me to Heera & Associates, who I thought was an attorney. On June 15, 2002, I went to Heera & Associates, located at 90 E. Gish Road, Suite A, San Jose, CA 95112, with Tel: 408-573-8489 and 408-422-8841. First I met with Sarjit S. Heera (Steve) (please see his visiting card as "A"), who told me he will handle my immigration case. Mr. Heera told he was an attorney. I paid Mr. Heera cash of $1,000. He did not give me any receipt. He arranged Bajjit Singh to type my application for asylum (see Exhibit B) and Mr. Heera who asked to sign me the application, mailed it.

On May 15, 2003, I visited Mr. Heera, who asked me to pay another $800 to represent me for interview of May 21, 2003. Mr. Heera did not give me any receipt for this payment. After interview, on March 31, 2005, my case was denied and referred

to the Immigration Court in San Francisco, California.

On April 1, 2005, I met with Mr. Heera to discuss about the upcoming hearing of April 22, 2005 before the Immigration Court. Mr. Heera told me my case is denied and I had to hire another attorney for this case because he does not handle the cases in the court. Mr. Heera asked me to pay and I paid again $1,000 for the court case, I did not get any receipt of the payment. On same-day on April 1,, 2005, Mr. Heera took me to the office of Judith Lott, who without preparing my case told me to meet her in the immigration court on April 22, 2005. I did not pay any money to Ms. Lott. I believe Mr. Heera paid Ms. Lott but Judith Lott never told me what her legal fee was and never gave me a retainer agreement. I believed that Ms. Lott was attorney working together with Mr. Heera.

On April 22, 2005, Judith Lott represented me in the court and got a new date for January 9, 2006. On January 8, 2006 I went to see Mr. Heera and Mr. Heera's wife Jeet Kaur (Ms. Kaur) asked me to pay and I paid $1,400 in cash for the court case, but she did not give me any receipt. Ms. Kaur took me to office of Ms. Lott, who spent approximately 20 minutes discussing about my case and told me to see her at the court on next date on January 9, 2006, I was not asked and did not pay any money to Judith Lott. Then, my case was rescheduled for March 6, 2006, and again rescheduled for March 15, 2006.

On March 15, 2006 my case was denied by the judge and Ms. Loot asked me to file an appeal. I paid appeal fee of $310 to Judith Lott, who gave a receipt for the first time. See Exhibit 'C". On the same date I told Judith Lott that I was moving to New York and gave me my new address of 42-52 Union Street, Apt #404 Flushing, NY 11355, where I still reside. Later on, the same day on March 15, 2006, I met with Mr. Heera and gave my new address in New York, who filled out a change of address form and mailed, which was received by the USCIS on March 28, 2006. See Exhibit D.

On October 11, 2006, Mr. Heera asked me to pay another $1250 for the appeal fee preparation fee and I paid it by a check payable to Surjit Heera. See Exhibit 'E".

I was on regular contact with Mr. Heera and his wife Ms. Kaur, who told me there is no decision on my case. I also never heard from Ms. Judith Lott about the status of my case.

When about five days ago I asked my friend to help and the friend called 1-800-898-7180 number and punched my alien number and found that my case was denied by the Board of Immigration Appeal (BIA) on March 28, 2007. I was surprised. I did not get any notice of denial of BIA decision from my attorney Judith Lott. I called Ms. Herra's wife Ms. Kaur who told me she will call me after checking with Ms. Lott. But Ms. Kaur did not call me back. I called Ms. Kaur, who told me she does not have any answer. But Ms. Kaur asked to go to California to see Ms. Kaur to file a motion to

reopen my case. I called and left message to Ms. Judith Lott, but she never returned my call.

On June 5, 2006, I visited my new attorney Mr. Khagendra Gharti-Chhetry, Esq. (Mr. Chhetry), in New York, who after checking confirmed me that my case was denied on March 28, 2007 and the said denial notice was sent by the BIA to my attorney Judith Lott.

Now, I came to know that Heera and Associates and persons working there, Sarjit S. Heera (Steve) and his wife Jeet Kaur are not attorneys, who told me they were attorneys. These individuals took my money and hired Judith Lott, who was paid by these individuals without my knowledge. I was not given any retainer agreement.

My case was first denied by the immigration judge because Mr. Heera had written wrong date August 1997 as the death of Lakhbit Singh alias Lakha. If Ms. Judith Lott had prepared my case properly and corrected the mistake my case would not have denied because there were mistakes made by non lawyer and they would have been corrected.

Please note that as required on the advice of my new attorney I notified my previous attorney Judith Lott that I received ineffective assistance of counsel. See attached as "F". On June 18, 2007, Judith Has sent a response to my new attorney as Exhibit "G". In reply Ms. Lott claims to have sent a notice to my old address even if I had given her my new address in New York. She fails to state her correct relation with Mr. And Mrs Heera. Ms. Loot never gave me time to prepare my case which is

reason that she admits in her letter that I did not disclose information about Mr. Singh. I never got and signed retainer. I never got call or message from her in my cell phone which she has it. My prior attorney's relation with Mr. Heera and his wife compromised my interest in effective representation which clearly shows that lack o preparation on my case. I wish to have an opportunity to fully litigate my case properly.

I received ineffective assistance of counsel because I am a victim of unauthorized practice of law by Mr. Heera and Ms. Kaur who hired attorney Judith Lott. Ms. Lott also did not protect my interest but worked with these persons to my detriment. Ms. Lott never prepared my case and as a result Judge found that adverse credibility. As a result, I lost my case. I was not notified by Ms. Lott and never got any notice of denial from the BIA. As a result, I received ineffective assistance of counsel. Please take any or appropriate action and help me to reopen and reconsider my case.

The above statement is read to me in my language and it is true and correct.

/s/ JOGINDER SINGH
Joginder Singh
45-52 Union Street
Apt #404
Flushing, NY 11355.

Notary Public

[handwritten]
Sworn to before me on June 19, 2007

[stamp]
KHAGENDRA GHARTI-CHHETRY
Notary Public, State of New York
No 31-4920542
Qualified in New York County
Commission Expires Jan. 25, ~~199~~2010

I. JURISDICTIONAL STATEMENT

This is a petition for review of the April 15, 2008 denial by the Board of Immigration Appeals ("BIA," the "Board") of the motion to reconsider ("Motion") of Petitioner Joginder Singh ("Petitioner"). The BIA's decision is not reported.

The denial of the Petitioner's Motion constitutes a final order of removal. This Court's jurisdiction to review final orders of removal by way of Petition for Review is found at § 242 of the Act, 8 U.S.C. § 1252. This Court has subject matter jurisdiction regarding final orders of deportation arising out of the United States Immigration Court in San Francisco, California, which lies within the geographical boundaries of the United States Court of Appeals for the Ninth Circuit.

The Act, 8 U.S.C. § 1101 et seq., gives the IJ subject matter jurisdiction over this matter, and the Board has appellate jurisdiction over the decisions of the IJ pursuant to 8 C.F.R. § 1003.1(b)(3).

II. STATEMENT OF THE ISSUE PRESENTED

Where, as here, an asylum applicant shows that through the lack of diligence of non-attorneys who purported to represent him and misled him into concluding that they were attorneys, and through the lack of diligence of counsel in assisting him in preparing his case, a mistake of fact occurred on the record upon which the IJ relied as crucial in reaching an adverse credibility determination, did the Petitioner make a showing of ineffective assistance of counsel?

III STATEMENT OF THE CASE

The Petitioner, a native and citizen of India, was put into removal proceedings by a March 22, 2005 Notice to Appear ("Notice"). Joint Appendix ("J.A.") J.A. 000470-000471. He requested asylum, withholding of removal under the Act, and relief under Article 3 of the CAT. J.A. 000421 – 000435. He was found removable and ordered removed by United States Immigration Judge Lawrence N. DiCostanzo (the "IJ") in the IJ's March 15, 2006 decision at the conclusion of a hearing held that date. J.A. 000253 – 000264; J.A. 000361 – 000364. In a short opinion and order dated March 28, 2007, the BIA adopted and affirmed the IJ's decision. J.A. 000238.

The Petitioner then filed a Motion to Reopen dated June 26, 2007. J.A. 000141 – 000146. The Board denied the Motion in an August 21, 2007 opinion. J.A. 000125 – 000126.

Thereafter, the Petitioner filed the Motion in a filing dated September 27, 2007. J.A. 000021 000023. Deeming this latest Motion a "Motion to Reconsider," the BIA denied the Motion in an April 15, 2008 decision. J.A. 000002 – 000003.

This Petition for Review followed.

IV. STATEMENT OF FACTS

The Petitioner sought asylum, withholding of removal under the Act, and withholding of removal under the Convention Against Torture, on the grounds that he was persecuted for his activism on behalf of fellow Sikhs. At the core of the application was his account of his participation in a rally to

protest and mourn the death of Lakhvir Singh, who allegedly was illegally killed at the hands of the Punjabi police in August 1997. J.A. 000242. The government confronted the Petitioner at trial with a disparity between that testimony and the date given in his asylum application, which was that the death occurred in August 1999. J.A. 000246. The Petitioner testified that he could not provide an explanation of the discrepancy. J.A. 000246. The IJ concluded that this discrepancy was one of two areas in the Petitioner's testimony that were "fatal" to the asylum application. J.A. 000245. Finding that the Petitioner was not credible, the IJ entered an order denying all relief. J.A. 000248 – 000250.

Thereafter, the Petitioner filed a motion to reopen. J.A. 000141 – 000146. He therein alleged that. The Petitioner was victimized by a non-attorney, Heera & Associates, whom the Petitioner was told was an attorney, but was not. J.A. 000141. The Petitioner paid money to this firm to handle his immigration case and, after the case was assigned to immigration court, he was told that an attorney had to be hired for court appearances. J.A. 000140. The Petitioner was then introduced to Judith Lott, who handled his case at trial, but who did not give adequate time to prepare the case in detail. J.A. 000142 – 000143.

Mr. Heera, who handled his case in the early stages, wrote the wrong date for the death of Lakhbit Singh (alias Lakha), on the application for asylum. J.A. 000143. The discrepancy between this date and the true date that was given by the Petitioner

in his testimony was cited by the IJ as one of the critical factors underlying the adverse credibility determination. The Petitioner contended that he received ineffective assistance of counsel because he was a victim of persons engaged in the unauthorized practice of law by Heera & Associates, and because Ms. Lott did not protect his interests by not giving adequate time to preparation of the case. J.A. 000144. In addition, Ms. Lott did not provide the Petitioner with a copy of the BIA decision denying his appeal in a timely manner. J.A. 000145.

In its August 21, 2007 decision, the Board denied the Petitioner's motion. J.A. 000125 – 000126. The Board denied the motion, holding that it did not comply with *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988) in that the Petitioner had not filed a complaint with a state disciplinary authority; that the Board was unpersuaded that the reason the Petitioner did not receive the Board's March 28, 2007 decision was that the previous attorney did not use the address he previously gave to her, and that the Petitioner failed to explain how the actions of the non-attorneys prejudiced him. J.A. 000125 – 126.

Thereafter, the Petitioner re-filed his Motion, attaching a copy of a disciplinary action filed against Judith Lott. J.A. 000021 – 000023. The Petitioner contended that the failure of non-attorneys to note the correct date of death of Lakhbit Singh (alias Lakha), and the failure of Judith Lott to devote enough time to the case to rectify this mistake, led directly to the adverse credibility finding of the IJ.

Id. In its April 15, 2008 opinion, the Board denied the Motion. J.A. 000002 – 000003.

This Petition for Review followed.

V. SUMMARY OF THE ARGUMENT

The Board was incorrect in holding, in the first place, that the Petitioner had not complied with *Lozada*; that decision only requires that the Petitioner explain why he has not made an attorney disciplinary complaint, not that he file such a complaint in every case.

Also, the Board was incorrect on the merits in holding that the Petitioner had not been prejudiced by the mistakes of his counsel and the non-attorneys who purported to represent him. The mistake of fact as to the death of Lakhbit Singh, which was perpetrated by the non-attorneys, and not caught by his counsel who did not spend adequate time preparing the case, led directly to the adverse credibility finding of the IJ, and was one of only two discrepancies that he recognized as "fatal" to the Petitioner's asylum claim. While there were other factors impacting the adverse credibility finding, there is no reason for assuming that the IJ would have found the Petitioner's testimony incredible if the discrepancy as to the date of the Lakhbit Singh's death had not occurred. Thus, the Petitioner has shown a lack of diligence of counsel and of the non-attorneys who fraudulently led him to think that they were attorneys, and his Petition should be granted.

VI. ARGUMENT

A. Standard of Review

This Court reviews the denial of a motion to reopen for abuse of discretion. *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008). Any findings of fact made in the course of the decision are reviewed for substantial evidence. *Jie Lin v. Ashcroft*, 377 F.3d 1014,1024 (9th Cir. 2004) (as amended). Questions of law are reviewed *de novo*. *Hernandez v. Mukasey*, 524 F.3d 1014,1017 (9th Cir. 2008), *citing Castillo-Perez v. I.N.S.*, 212 F.3d 518, 523 (9th Cir. 2000).

B. The Record Compels The Conclusion That The Petitioner Received Ineffective Assistance of Counsel.

In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), *aff'd sub nom. Lozada v. INS*, 857 F.2d 10 (1st Cir. 1988), the Board held that a petitioner seeking relief on the basis of ineffective assistance of counsel must make the following showing:

> A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this

> regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

19 I. & N.at 639.

This Court has held that "[i]neffective assistance of counsel amounts to a violation of due process if 'the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Mohammed v Gonzales*, 400 F.3d 785,793 (9th Cir. 2005), *citing Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004), and *Lopez v. I.N.S.*, 775 F.2d 1015, 1017 (9th Cir. 1985). To make out an ineffective assistance claim, an immigrant must show (1) that counsel's performance was deficient, and (2) that counsel's deficiency caused prejudice. *Mohammed*, *supra*, 400 F.3d at 793-94. Prejudice results when counsel's performance is "so inadequate that it may have affected the outcome of the proceedings." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). These tests are satisfied in this case.

Ineffective assistance claims are recognized where, as here, an alien relied on non-attorneys who have fraudulently led the alien to believe that the person relied on was an attorney. *Varela v. I.N.S.*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. I.N.S.*, 184 F.3d 1097,1100 (9th Cir. 1999). As the Board observed in this case (J.A. 000126), strict compliance with the terms of *Lozada* are not necessary. In *Castillo-Perez*, *supra*, this Court held that only "substantial compliance" with these requirements was necessary where, as here, "an adequate factual basis exists in the record for an ineffectiveness complaint and . . . the complaint is a legitimate and substantial one." *Castillo-Perez*, *supra*, 212 F.3d at 526. In *Castillo-Perez*, the record reflected clearly that an alien's counsel failed to file a timely application for relief and either misled or misinformed the alien. See also, *Granados-Oseguera v. Gonzalez*, 464 F.3d 993 (9th Cir. 2006) (failure to timely file a petition for review or a motion to reopen with the 30-day voluntary departure period constituted ineffective assistance of counsel without strict compliance with *Lozada* factors). In *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331 (9th Cir. 2000), also cited by the Board below (J.A. 000126), there was confusion as to whether the attorney who was present at the hearing even was the petitioner's counsel. *Id.* at 1334-35.

Contrary to the Board's conclusion, it is not necessary to fit within either of those fact patterns in order for "substantial compliance" to exist. J.A. 000126. Instead, this Court will relax the rule of strict compliance with the rule of *Lozada* when-

ever "there is substantial compliance with *Lozada* such that the purpose of *Lozada* is fully served by other means." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824-25 (9th Cir. 2003). This is such a case.

Here, the facts in the record establish that the Petitioner received ineffective assistance of counsel. The Petitioner was victimized by a non-attorney, Heera & Associates, whom the Petitioner was told was an attorney, but was not. J.A. 000141. The Petitioner paid money to this firm to handle his immigration case and, after the case was assigned to immigration court, he was told that an attorney had to be hired for court appearances. J. A. 000140. The Petitioner was then introduced to Judith Lott, who handled his case at trial, but who did not give adequate time to prepare the case in detail. J.A. 000142 – 000143.

Mr. Heera, who handled his case in the early stages, wrote the wrong date for the death of Lakhbit Singh (alias Lakha), on the application for asylum. J.A. 000143. The discrepancy between this date and the true date that was given by the Petitioner in his testimony was cited by the IJ as one of the critical factors underlying the adverse credibility determination. The Petitioner contended that he received ineffective assistance of counsel because he was a victim of persons engaged in the unauthorized practice of law by Heera & Associates, and because Ms. Lott did not protect his interests by not giving adequate time to preparation of the case. J.A. 000144. In addition, Ms. Lott did not provide the Petitioner with a copy of the BIA deci-

sion denying his appeal in a timely manner. J.A. 000145.

The Petitioner satisfied all ingredients of *Lozada*. That case does not require an alien to file a disciplinary complaint, but either to file such a complaint or explain why such a complaint was not filed. *Lozada*, *supra*, 19 I.& N. Dec. at 639. Here, the Petitioner provided an explanation for his failure to file a disciplinary complaint against Ms. Lott J.A. 000146. The Board improperly referred to the Petitioner's not filing a disciplinary complaint as failing to comply with a "procedural requirement." J.A. 000125.

The mistake of fact as to the death of Lakhbit Singh, which was perpetrated by the non-attorneys, and not caught by his counsel who did not spend adequate time preparing the case, led directly to the adverse credibility finding of the IJ, and was one of only two discrepancies that he recognized as "fatal" to the Petitioner's asylum claim. While there were other factors impacting the adverse credibility finding, there is no reason for assuming that the IJ would have found the Petitioner's testimony incredible if the discrepancy as to the date of the Lakhbit Singh's death had not occurred. Thus, the Petitioner has shown a lack of diligence of counsel and of the non-attorneys who fraudulently led him to think that they were attorneys, and his Petition should be granted.

Moreover, failing to advise the Petitioner of the Board's March 28, 2007 decision, which the Petitioner alleges, is *ipso facto* a failure to adhere diligently to standards of good practice. Thus, the

Board erred when it held that the Petitioner had not shown ineffective assistance of counsel when he did not receive the March 28, 2007 decision. The Petitioner also clearly explained how Heera & Associate's mistake in filling out the asylum application, and Ms. Lott's failure to review and diligently prepare the case with the Petitioner regarding the mistaken date, led directly to the adverse credibility determination of the IJ and prejudiced the Petitioner.

To comply with the Board's August 31, 2007 order denying the first motion to reopen, the Petitioner filed a complaint with the California state bar, and refiled the Motion, reiterating that the failure to correct the mistake as to the date of death of Lakbvir Singh led directly to the adverse credibility determination of the IJ. J. A. 000022 – 000023.

Finally, the Board denied the Motion because at the hearing, the Petitioner had allegedly failed to provide a coherent or convincing explanation for the discrepancy of the date of death of Lakbvir Singh. J.A. 000003. The Board should not have expected the Petitioner to provide an explanation at trial when confronted for the first time with a misstatement in the asylum application when until that point he had no reason to suspect that Heera & Associates had recorded the incorrect date. It was only subsequent to the date of the hearing that the Petitioner was able to reconstruct what had happened in the preparation of his asylum application, and consequently filed the Motion alleging ineffective assistance of counsel.

Petitioner submits that, under these circumstances, he stated an ineffective assistance of counsel claim against Heera & Associates and against Ms. Lott, and that this Court should grant the Petition, vacate the order below, and remand this matter to the agency for further proceedings.

CONCLUSION

For the above arguments and reasons, this Board should grant the Petition, vacate the Board's determination and remand to the agency for further determination, and grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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